IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

* * *

NO. 76-724

* * *

**W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,**
Petitioner

V.

BUFFORD LENELL McDONALD,
Respondent

* * *

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

* * *

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Atty Gen.

JOE B. DIBRELL
Assistant Attorney General

DUNKLIN SULLIVAN
Assistant Attorney General

PATRICK P. ROGERS
Assistant Attorney General

P. O. Box 12548
Capitol Station
Austin, Texas 78711

Attorneys for Petitioner

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* * *

Petition for Writ of Certiorari
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* * *

Your Petitioner, W. J. Estelle, Jr., Director, Texas Department of Corrections, respectfully prays this court to issue a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, for review of the Court of Appeals Judgment entered August 6, 1976, in the above entitled cause.

OPINION BELOW

The opinion delivered by the Court of Appeals is reported as *McDonald v. Estelle*, 536 F.2d 667 (5th Cir. 1976); and a copy is attached to this petition as Appendix A. The formal judgment attached as Appendix B. The letter from the Court of Appeals summarily denying your Petitioner's petition for rehearing is attached as Appendix C.

In lieu of drafting another opinion, the opinion of the United States District Court for the Northern District of Texas, Amarillo Division, was adopted as the opinion of the Court of Appeals. (See Appendix A).

The opinion and judgment of the Texas Court of Criminal Appeals, which reviewed the state court conviction on direct appeal is reported as *McDonald v. State*, 513 S.W.2d 44 (Tex. Crim. App. 1974); and a copy of the same is attached hereto as Appendix D.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered August 6, 1976, with your Petitioner's motion for rehearing being denied on October 4, 1976. (Appendix A, B, and C).

This court has jurisdiction to grant a writ of certiorari pursuant to the provisions of 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

I.

Whether a federal habeas corpus applicant can attempt to establish the alleged invalidity of a prior conviction used in the punishment phase of a state conviction under collateral attack when he affirmatively did not object to the use of or validity of the prior conviction at the time it was used?

II.

Who has the burden of proof (the state or the habeas corpus applicant) in a federal habeas corpus proceeding to prove the voluntary waiver of counsel and thus, the validity of a prior conviction used, during the punishment phase of the state conviction under collateral attack, to impeach the convicted defendant?

A. Alternatively, whether the use of McDonald's 1960 Arkansas (prior) conviction during the punishment phase of his state trial under collateral attack was harmless error beyond a reasonable doubt?

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury . . . and to have the assistance of counsel for his defense.

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> No state shall . . . deprive any person of life, liberty, without due process of law . . .

STATEMENT OF CASE AND FACTS

Respondent McDonald was convicted by a jury in the 69th Judicial District Court of Castro County, Texas, for the felony offense of sodomy committed on various minor children.[1] On January 25, 1973, the same jury assessed McDonald's punishment at 15 years in the state penitentiary.

During the punishment phase of McDonald's state trial, the prosecution introduced three prior convictions of the Respondent.[2] Pursuant to the provisions of Article 37.07, Texas Code of Criminal Procedure, the three

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[1]Then Article 524, Texas Penal Code.

[2]Pursuant to Article 37.07, Texas Code Criminal Procedure, Texas follows a bi-fracated trial system--(a) guilt innocence phase, and (b) punishment phase.

prior convictions were submitted to impeach McDonald by establishing his "prior criminal record." They were not introduced to enhance his punishment. The prior convictions introduced are as follows:

Prior Conviction No. 1: In 1960, McDonald was convicted in Pope County, Arkansas, on his plea of guilty, in Cause No. 2864 for the felony offense of "theft of a cow" and sentenced to one (1) year in the Arkansas State Penitentiary. (Appendix F). Article 41-3917, Ark. Statutes provided that upon conviction for theft of cattle, punishment shall be confinement in the penitentiary for not less than one (1) nor more than five (5) years.

Prior Conviction No. 2: In 1968, McDonald was convicted in the 47th Judicial District Court of Potter County, Texas, in Cause No. 13,833 for the felony offense of sodomy and granted a ten-year probated sentence.[3]

Prior Conviction No. 3: In 1971, McDonald was convicted in the Justice Court of Deaf Smith County, Texas, for the misdemeanor offense of "theft under five dollars." He was convicted pursuant to then Article 1410, *et seq*, Texas Penal Code and assessed a fine of twenty-five dollars.

As each of the three prior convictions were introduced at the punishment phase of McDonald's 1973 sodomy trial, McDonald's attorney affirmatively stated, on the record, that there were "no objections." (Appendix G). This point was noted in the Texas Court of Criminal Appeals opinion following a direct review of the

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[3]There are two (2) sodomy convictions of the Respondent referred to in this case--(1) a 1968 conviction for sodomy referenced as prior conviction no. 2; and, (2) a 1973 conviction for sodomy (the instant case under collateral attack).

conviction. *McDonald v. State*, 513 S.W.2d 44, 51. (Appendix D, pp. D-55).

To collaterally attack his 1973 sodomy conviction, McDonald filed an application for writ of habeas corpus in the United States District Court pursuant to 28 U.S.C. §2241 *et seq.* In his application, McDonald claimed all three of his priors were uncounselled convictions and, as such, were improperly introduced under *Loper v. Beto*, 405 U.S. 473 (1972).

Following an evidentiary hearing, at which McDonald had counsel, the United States District Court found that prior conviction no. 2 (the 1968 sodomy conviction) and prior conviction no. 3 (the misdemeanor theft under five dollars) were properly admissible during the punishment phase of the 1973 trial.[4] *McDonald v. Estelle*, 536 F.2d 667, 671. (Appendix A, pp. A-29).

Basing a conclusion solely on McDonald's testimony, the district court found that at the time of McDonald's prior conviction no. 1 (the Arkansas theft of cow conviction), McDonald was not represented by counsel. Accordingly, the Arkansas conviction was concluded to be defective and not admissible under *Loper v. Beto, supra*. The Court of Appeals affirmed the granting of McDonald's writ of habeas corpus by the adopting of the

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[4]As to Prior Conviction No. 2, the state records were perfectly clear that McDonald had counsel. In regard to Prior Conviction No. 3, a conviction for such offense was only punishable by fine up to $200.00 and was not punishable by imprisonment in jail or penitentiary. *See Argersinger v. Hamlin*, 407 U.S. 25 (1972).

district court opinion.[5] Your Petitioner filed a motion for stay of the Court of Appeals mandate which was granted until November 20, 1976, with the provision that the stay should be continued until disposition of this cause by this court if your Petitioner's writ of certiorari was filed on or before November 20, 1976. (Appendix E). Your Petitioner now files his petition for certiorari within the time prescribed by 28 U.S.C. §2101 (c).

REASONS FOR GRANTING THE WRIT

Your Petitioner's writ of certiorari on issue no. 1 should be granted because a determination should be made by this court as to whether a habeas corpus applicant must object to the admissibility of an alleged prior conviction used at the state court level before he can assert a constitutional deprivation in a federal habeas corpus proceeding. This issue has significant importance to all state and federal courts in the United States because if an objection is not mandatory, a convicted defendant can present a point on habeas corpus that is not properly reviewable on direct appeal.

Your Petitioner's writ of certiorari on issue no. 2 should be granted because the Court of Appeals made an

[5]The District Court and Court of Appeals also concluded that the introduction of the Arkansas conviction was not harmless error. Your Petitioner maintained, then and now, that the State's use of the Arkansas conviction was *immaterial* and had *no effect upon* the sentence assessed by the jury. McDonald, at the time of his 1973 prosecution, was on trial for his *second* sodomy charge involving the *same conduct* on *minor children* for which he had been previously convicted in Potter County, Texas, in 1968. It was this 1968 sodomy conviction and the numerous extraneous sodomy offenses introduced during the guilt-innocence phase of the trial (513 S.W.2d 44, 49; Appendix D, pp. D-48-54) which impeached McDonald's character and the sole reason he received a 15-year sentence. Accordingly, the Court of Appeals *erroneously* concluded that the harmless error doctrine should not apply. *Chapman v. California*, 386 U.S. 18 (1967).

ambiguous decision which is in conflict with a prior decision of the Supreme Court of the United States.

ARGUMENT AND AUTHORITIES

I.

A federal habeas corpus applicant cannot attempt to establish the alleged invalidity of a prior conviction used in the punishment phase of a state conviction under collateral attack when he affirmatively did not object to the use of or validity of the prior conviction at the time it was used.

As the court of appeals found McDonald's prior convictions nos. 2 and 3 were properly admissible, the only prior conviction now of concern is McDonald's prior conviction no. 1 (the 1960 Arkansas conviction).

When the Arkansas conviction was introduced into evidence during the punishment phase of McDonald's 1973 state trial, McDonald's attorney affirmatively stated, on the record, there were "no objections" regarding its admissibility. (Appendix G, pp. G-64).

During a federal habeas corpus evidentiary hearing in the United States District Court, your Petitioner not only introduced into the record the state court statement of facts affirmatively establishing that there were "no objections" to the introduction of the Arkansas conviction at the time of his 1973 state trial, but also introduced official Arkansas state court records which stated that McDonald appeared before the Arkansas state court, was advised of the charges against him, and "waived benefit of counsel."[6] (Appendix F). The only

[6]McDonald entered a plea of guilty after waiving counsel.

evidence offered by McDonald to refute your Petitioner's documented evidence was McDonald's own uncorroborated testimony.

If there was an impurity in the 1960 Arkansas conviction, why didn't McDonald's attorney object to its admissibility when it was offered to show part of McDonald's prior criminal record?[7] The answer to this question lies only in the mind and judgment of McDonald's attorney and/or McDonald himself at the time, during McDonald's 1973 trial, the Arkansas conviction was used. This court has acknowledged that *"under our adversary system, once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial, rests with the accused and his attorney. Any other approach would rewrite the duties of trial judges and counsel in our legal system." Estelle v. Williams,* ___U.S.___, 96 S.Ct. 1691, 1697 (1976).

Williams concludes by holding:

> *(the) failure to make an objection to the court as to being tried in (jail clothes), for whatever reason, is sufficient to negate the presumption of compulsion necessary to establish a constitutional violation. 96 S.Ct. 1691, 1697.*

Although *Williams* was a jail clothes case, the same proposition should apply in the case at bar; i.e., "the failure to make an objection to the trial court regarding

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[7]The Court of Appeals concluded that after a full review of the record, McDonald was not denied effective assistance of counsel. The Court stated "in fact, the assistance rendered by the appointed attorney was well within the standards announced in *MacKenna v. Ellis,* 280 F.2d 592, 599 (5th Cir. 1960)." 563 F.2d 667, 670. (Appendix A, pp. A-27).

the admissibility of any prior conviction to establish a prior criminal record of a convicted defendant, for whatever reason, operates as a bar to later assert in a habeas corpus proceeding any constitutional violation." *Also see, Francis v. Henderson,* ___U.S.___,96 S. Ct. 1708 (1976); *Davis v. United States,* 411 U.S. 233 (1973); *Boulware v. State of Texas,* ___S.W.2d___, No. 50,524 (October 6, 1976).

One of the reasons is, as in this case, the consideration of the question as to whether McDonald had counsel or properly waived counsel at the time of his 1960 plea of guilty is conducting a second-level collateral review of a judgment rendered in the State of Arkansas. The State of Arkansas was not a party to the Texas habeas proceedings, and, of course, had no interest whatsoever in sustaining the validity of the sentence long since served. If there were any surviving witnesses to the actual court proceedings, which took place some sixteen (16) years ago, they are sufficiently distant from the location of the Texas habeas court as to render their voluntary appearance unlikely, and their compulsion by process impossible. See *Loper v. Beto,* 405 U.S. 473,500.

The net result in requiring a habeas corpus applicant to first assert his constitutional claim to the state trial court will necessarily result in a cleaner state trial,[8] if in fact an unpure conviction exists, and decrease the habeas corpus docket now lingering like a giant octapus and destroying the efficiency of our criminal justice system.

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[8]If a defendant was first required to make his objection to the use of prior convictions during a state prosecution, the trial court could hold a *Jackson v. Deno,* 378 U.S. 368 (1964), hearing outside the presence of the jury to determine the prior conviction's validity or invalidity.

One further point merits mention. A holding such as the one respectfully requested by your Petitioner would eliminate the possibility of a defense attorney not objecting to or a convicted defendant not informing his attorney of a prior counselless conviction which was being used before the jury during the punishment phase to establish the convicted defendant's prior criminal record. Without the requirement of an affirmative objection on the record to the admissibility of the prior conviction complained of, the defense attorney and/or the convicted defendant can quietly lay behind the habeas corpus log and possibly have another opportunity to be acquitted in a subsequent trial. *Cf., Estelle v. Williams, supra; Francis v. Henderson, supra; Davis v. United States, supra; Boulware v. State of Texas,* ___S.W.2d___, No. 50,524 October 6, 1976). Such seems to be extremely prejudicial to our criminal justice system.[9] & [10]

Accordingly, your Petitioner asserts that the failure to object to the admissibility of a prior conviction used to establish a convicted defendant's prior criminal record constitutes an absolute waiver to later complain in a habeas corpus proceeding that the primary conviction under collateral attack is invalid because of the

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[9]In a letter from the Respondent McDonald to Mr. Bob Buntyn, he acknowledges one of such prejudices. (Appendix H).

[10]Were punishment is assessed by jury, the law entitles a convicted defendant to a completely new trial if a defect occurs during the punishment phase. *McDonald v. Estelle,* 536 F.2d 667, 672. *Also see, Turner v. State,* 485 S.W.2d 282 (Tex.Cr.App.1972). If punishment is assessed by the Court and a harmful defect occurs during the punishment phase, the convicted defendant is only entitled to a new punishment hearing. *Elizalde v. State,* 507 S.W.2d 749 (Tex.Cr.App. 1974). In Texas, except in capital punishment cases, the defendant has an election whether his punishment is to be assessed by the Court or jury. Article 37.07, Texas Code Criminal Procedure.

admissibility of an alleged invalid prior conviction. At least, the court should conclude that a showing for good cause must be established by the habeas corpus applicant for not making such an affirmative objection before the trial court before such ground can be considered in a habeas corpus proceeding.[11] *cf., Estelle v. Williams, supra; Francis v. Henderson, supra.* To hold otherwise, will allow a convicted defendant to have a point reviewable on habeas corpus which is not reviewable upon direct appeal. *McDonald v. State,* 513 S.W.2d 44, 52. (Appendix D, pp. D-55).

The decision of this Court respectfully requested herein will not destroy or diminish any Sixth Amendment right of an accused. Further, such a decision will not destroy any right established under *Gideon v. Wainwright,* 372 U.S. 335 (1963); *United States v. Tucker,* 404 U.S. 443 (1971); *Burgett v. Texas,* 389 U.S. 109 (1967); or *Loper v. Beto, supra.* The decision will clarify that an objection at the trial court level is mandatory (or the showing of good cause by the habeas corpus applicant for failing to object) before a habeas corpus applicant can attempt to challenge the validity of a prior conviction used in a state court proceeding.

II.

The habeas corpus applicant has the burden of proof to establish that he did not voluntarily waive counsel and thus, the validity of a prior conviction which was used, for impeachment purposes, during the punishment phase of the state conviction under attack.

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[11]The record reflects no good cause for failing to object at the trial level. Also, good cause for failure to object was not shown to the Texas Court of Criminal Appeals, 513 S.W. 2d 44 (Appendix D).

In the case at bar, the court below followed a previously established Fifth Circuit holding that a minute entry alone does not establish sufficient proof to establish a voluntary waiver of counsel. *McDonald v. Estelle, supra,* citing *Dunlin v. Henderson,* 448 F. 2d 1238 (5th Cir. 1971); *Gutierez v. Estelle,* 474 F.2d 899 (5th, Cir. 1973). Petitioner did not merely introduce a minute entry of the court's docket, but instead, introduced the Arkansas judgment and sentence establishing a waiver of counsel. (Appendix F). Thus, the record was not silent as in *Burgett v. Texas, supra,* and a strong presumption of waiver should exist.

In *McDonald* the Fifth Circuit further stated that the burden of proof is on the state to establish that McDonald knowingly and voluntarily waived counsel at the time of his 1960 Arkansas conviction. *See McDonald v. Estelle,* 536 F.2d 667, 671. (Appendix A, pp. A-29). This, of course, is erroneous and is in conflict with the law established by this court. In *Johnson v. Zerbst,* 304 U.S. 458 (1938), this Court stated:

> *It must be remembered, however, that a judgment cannot be lightly set aside by collateral attack, even on habeas. When collaterally attacked, the judgment of a court carries with it the presumption of regularity. When a defendant, without counsel, acquieseces in a trial resulting in his conviction and later seeks relief by extraordinary remedy of habeas corpus, the burden of proof rests on him to establish (by a preponderance of evidence) that he did not competently and intelligently waive his constitutional right to assistance of counsel. 304 U.S. 458, 468-469. Also see, Loper v. Beto, 405 U.S.473, 502.*

The Fifth Circuit has acknowledged that the burden of proof is on the habeas corpus applicant seeking

collateral relief. *Banda v. Estelle,* 519 F.2d 1057 (1975); *Webster v. Estelle,* 505 F.2d 926 (1954) citing *Swain v. Alabama,* 380 U.S. 202, 226-227 (1965). But, in the *McDonald* opinion, the court stated that the burden of proof rests on the State of Texas to prove that the Petitioner knowingly and voluntarily waived counsel. *McDonald v. Estelle,* 536 F.2d 66, 671. (Appendix A, pp. A-29). Such is in serious conflict with *Johnson v. Zerbst* opinion which specifically determined that the burden of proof rests with the habeas applicant to establish that he did not, competently and intelligently waive his constitutional right to assistance of counsel. 304 U.S. 458, 468.

At the federal court evidentiary hearing McDonald attempted to refute his waiver of counsel, as shown on the face of the official Arkansas state court records, through his own uncorroborated testimony. To allow McDonald's uncorroborated testimony to refute official state court records, which are entitled the presumption of regularity, *Webster v. Estelle,* 505 F.2d 926 (5th Cir. 1971), presumes that the Arkansas trial judge did not perform his duty to determine that McDonald was voluntarily waiving counsel under *Johnson v. Zerbst, supra.* Such a presumption Petitioner cannot accept in light of the Arkansas state court records produced. (Appendix F). Secondly, it nullifies a finding of waiver of counsel by the highest state criminal court in Texas, the Texas Court of Criminal Appeals. *McDonald v. State,* 513 S.W.2d 44,52. (Appendix D).

On direct appeal to the Texas Court of Criminal Appeals, McDonald advanced, for the first time, his contention that the trial court erred in admitting the prior convictions. In speaking about the Arkansas conviction, the Court of Criminal Appeals noted that the Arkansas records reflected that McDonald waived counsel. Furthermore, the Court noted that McDonald admitted there was no objection at time of trial and

concluded nothing was presented for review. *McDonald v. State*, 513 S.W. 2d 44, 52. (Appendix D, pp. D-55). Your Petitioner further believes that this Court should hold that, where the Texas Court of Criminal Appeals found that the Arkansas records reflected a waiver of counsel and McDonald offered no more than his uncorroborated testimony to refute official state court records, his claim should not be considered on a writ of habeas corpus. *Cf., Stone v. Powell*, ___U.S.___, 96 S.Ct. 3037 (1976) and *Wolff v. Rice*, ___U.S.___, 96 S.Ct. 3037 (1976).

Alternatively, if the Court disagrees with Petitioner, the case at bar should be reversed on the ground that the introduction of the Arkansas conviction was harmless error beyond a reasonable doubt under *Chapman v. California*, 386 U.S. 18 (1967). The District Court and Court of Appeals concluded that the introduction of the Arkansas conviction was not harmless error. Your Petitioner maintained, then and now, that the State's use of the Arkansas conviction was *immaterial* and had *no effect upon* the sentence assessed by the jury. McDonald, at the time of his 1973 prosecution, was on trial for his *second* sodomy charge involving the *same conduct* on *minor children* for which he had been previously convicted in Potter County, Texas, in 1968. It was this sodomy conviction and the numerous extraneous sodomy offenses introduced during the guilt-innocence phase of the trial (513 S.W.2d 44, 49; Appendix D, pp. D-48-54) which impeached McDonald's character and the sole reason he received a 15-year sentence. Accordingly, the Court of Appeals erroneously concluded that the harmless error doctrine should not apply. *Chapman v. California, supra.*

CONCLUSION

Your Petitioner respectfully believes that this court will improve our criminal justice system by granting a writ of certiorari and making a clear determination on the issues presented herein. The appropriate conclusions are: (1) the requirement that a habeas corpus applicant first established that he made an affirmative objection in the trial court to the admissibility of an alleged invalid prior conviction used to establish his prior criminal record before asserting such in a federal habeas corpus proceeding; and (2) a clear determination that the burden of proof on all habeas corpus questions, including waiver of counsel, is on the habeas corpus applicant seeking collateral relief.

In the alternative, this Court should conclude the harmless error rule is applicable in this case and reverse the Court of Appeals.

WHEREFORE, PREMISES CONSIDERED, your Petitioner prays that this court grant a writ of certiorari to the United States Court of Appeals for the Fifth Circuit and upon argument hereof enter a judgment in favor of your Petitioner and thereby reverse the United States Court of Appeals for the Fifth Circuit and thus deny the Respondent's application for habeas corpus.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant

JOE B. DIBRELL
Assistant Attorney General

DUNKLIN SULLIVAN
Assistant Attorney General

PATRICK P. ROGERS
Assistant Attorney General

P. O. Box 12548
Capitol Station
Austin, Texas 78711

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, Dunklin Sullivan, Assistant Attorney General of Texas, do hereby certify that two copies of the above and foregoing Petition for Writ of Certiorari have been served by placing same in the United States Mail, postage prepaid, properly addressed, certified, return receipt requested, this ____ day of November, 1976, to the following address: James Durham, Attorney at Law, 510 South Polk Street, Amarillo, Texas.

Dunklin Sullivan

APPENDIX A

McDONALD V. ESTELLE
Cite as 536 F.2d 667 (1976)

Bufford Lenell McDONALD,
Petitioner-Appelle,

v.

W. J. ESTELLE, Jr., Director, Texas Department of Corrections,
Respondent-Appellant.

No. 76-1576
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Aug. 6, 1976.

Texas prisioner filed a petition for a writ of habeas corpus. The United States District Court for the Northern District of Texas, Halbert O. Woodward, J., granted the requested relief and the State appealed. The Court of Appeals affirmed on the basis of the district court's opinion wherein it was held that the introduction of a prior uncounseled conviction at the penalty stage of the bifurcated trial was constitutional error and was not harmless beyond a reasonable doubt in light of the two to 15-year sentence received by the petitioner for the offense of sodomy.

Affirmed.

1. Criminal Law — 700

Where district attorney had shown accused's file to

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*Rule 18, 5 Cir.; see *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir., 1970, 431 F.2d 409, Part I.

counsel defending him on charge of sodomy, file included stack of approximately 15 pictures of young boys which had been delivered to district attorney by sheriff's office, prosecutor did not know significance of pictures until he was interviewing witnesses in preparation for trial, and photographs were not actually introduced in evidence, prosecutor's developing from one of the minor witnesses at trial that on one occasion accused had shown him a number of photographs of young boys with whom he "had did it" did not demonstrate that prosecutor had suppressed evidence.

2. Criminal Law — 641.13(6)

Defense counsel's failure to object to introduction of uncounseled prior convictions at penalty stage of accused's bifurcated trial did not establish ineffective assistance of counsel, despite fact that failure to object resulted in appellate court's refusal to consider whether introduction of such convictions was improper.

3. Criminal Law — 573

Length of delay between arrest and trial is only one of the elements to consider on determination as to whether constitutional right to speedy trial has been denied, and it is triggering device for inquiry as to existence of other elements.

4. Criminal Law — 573

Where prosecutor, after accused's arrest on charge of sodomy, deemed it advisable to seek to have accused's probation on prior offense in another county revoked because courthouse in county of subsequent offense was being remodeled and would not be available for trial for several months, but accused's probation was never revoked after transfer to that other county because on each occasion upon which revocation hearing was to

take place, accused had some mental or physical breakdown and trial judge saw some indication of insanity, delay of approximately six and one-half months between defendant's arrest and appointment of counsel did not deprive accused of his constitutional right to speedy trial.

5. Criminal Law — 1202(3)

In sodomy prosecution, admission at penalty stage of bifurcated trial of prior uncounseled conviction for misdemeanor for which accused was fined $25 was erroneous because justice court in Texas, in which conviction was obtained, was not court of record, but error was harmless beyond reasonable doubt. Vernon's Ann.Tex.C.C.P. art. 37.07.

6. Habeas Corpus — 25.1(8)

Texas prisoner challenging conviction on basis of introduction into evidence at penalty stage of bifurcated trial of prior uncounseled Arkansas conviction was entitled to question Arkansas conviction on habeas corpus. 28 U.S.C.A. § 2241 et. seq.; Vernon's Ann.Tex.C.C.P. art. 37.07.

7. Habeas Corpus — 25.1(8), 85.2(1)

Introduction of uncounseled prior conviction at penalty stage of bifurcated trial is constitutional error and burden rests on state to prove that accused knowingly and voluntarily waived counsel or that error in admitting evidence was harmless beyond reasonable doubt. Vernon's Ann.Tex.C.C.P. art. 37.07.

8. Criminal Law — 641.4(4)

Minute entry on court docket does not provide sufficient basis to establish accused's waiver of counsel.

9. Courts — 100(1)

United States Supreme Court decision in Gideon v. Wainwright, declaring that indigent defendants had right to counsel in felony prosecutions, was applicable retroactively and to permit conviction obtained in violation of Gideon to be used against person either to support guilt or to enhance punishment erodes principle of that case.

10. Constitutional Law — 266(4)

Use of prior convictions, void because uncounseled, for impeachment purposes, deprives accused of due process of law.

11. Criminal Law — 1202(3)
Habeas Corpus — 25.1(8)

Introduction of uncounseled prior felony conviction for cattle theft at penalty stage of bifurcated trial on charge of sodomy was constitutional error and was not harmless beyond reasonable doubt, in view of jury's imposition of indeterminate term of two to 15 years' imprisonment. Vernon's Ann.Tex.C.C.P. art. 37.07.

12. Habeas Corpus — 112

Even though error in admitting uncounseled prior conviction at penalty stage of bifurcated trial related to penalty alone, accused was entitled to entirely new trial. Vernon's Ann.Tex.C.C.P. art. 37.07.

John L. Hill, Atty. Gen., Patrick P. Rogers, Asst. Atty. Gen., David M. Kendall, 1st Asst. Atty. Gen., Joe B. Dibrell, Jr., Chief, Enforce. Div., Max P. Flusche, Jr., Asst. Atty. Gen., Austin, Tex., for respondent-appellant.

James D. Durham, Jr. (Court-appointed), Amarillo, Tex., for petitioner-appelle.

Bufford McDonald, pro se.

Appeal from the United States District Court for the Northern District of Texas.

Before THORNBERRY, CLARK and TJOFLAT, Circuit Judges.

PER CURIAM:

We affirm on the basis of the district court's opinion, which is set forth in the appendix.

APPENDIX

MEMORANDUM AND ORDER

BUFFORD LENELL McDONALD is a state prisoner, pursuant to judgment and sentence of the District Court of Castro County, Texas, in Cause No. 940. On January 25, 1973, he was convicted by jury under an indictment charging him with the felony offense of sodomy and he was sentenced to serve an indeterminate term of not less than two years nor more than fifteen years in Texas Department of Corrections. The Court of Criminal Appeals affirmed the conviction. *Mc Donald v. State*, 513 S.W.2d 44 (Tex.Crim.1974).

Petitioner has filed application for writ of habeas corpus pursuant to the provisions of Title 28, United States Code, Section 2241 et seq., and he is proceeding in forma pauperis. He challenges the above conviction contending that (1) he was illegally arrested without a warrant and without probable cause; (2) he was denied due process of law in that he was held in jail from the date of his arrest on September 20, 1971, and was refused assistance of counsel, until counsel was

appointed in March, 1972; (3) he was denied due process because he was never arraigned on the charge before the grand jury returned the indictment on April 4, 1972; (4) he was denied his constitutional right to a speedy trial; (5) he was not given timely notice of pre-trial hearing and did not have opportunity to properly prepare for the hearing; (6) he was not afforded a fair sanity trial; (7) the indictment was defective; (8) he was denied a fair trial and was tried as a criminal in general; (9) the prosecution illegally used extraneous offenses to rebut his alibi as to date of commission of the offense; (10) the State suppressed evidence which was favorable to his defense; (11) the trial judge failed to properly instruct the jury on the law concerning a minor as an accomplice; (12) the evidence was insufficient to support the conviction; (13) prior convictions upon, which he was not represented by counsel were introduced into evidence against him at the punishment phase of the bifurcated trial; (14) he was denied effective assistance of counsel during the punishment phase of the trial; (15) the jury considered parole prospects which was evidence outside the record; (16) he was mislead by the district attorney and did not have opportunity to file a reply brief on appeal; and (17) after the record had been approved on appeal, the clerk changed the file mark on the indictment.

Petitioner had presented many of the instant challenges on direct appeal to the Court of Criminal Appeals of Texas. That court delivered its comprehensive opinion on July 10, 1974, which fully considered the challenge to the warrantless arrest; the failure of the Court to arraign him prior to indictment; the sufficiency of the evidence; the objections to the Court's charge; and the admission into evidence of extraneous offenses at the guilt stage of the bifurcated trial. Petitioner also filed application for writ of habeas

corpus in the trial court where he effectively raised the remaining challenges as well as repeating those which he had urged on direct appeal to the Court of Criminal Appeals of Texas. The trial judge did not conduct an evidentiary hearing and on March 27, 1975, he filed findings of fact and conclusions of law pursuant to Article 11.07, Texas Code of Criminal Procedure. The Court of Criminal Appeals of Texas denied the application without written order on the findings of the trial court on April 16, 1975. Petitioner has exhausted available state remedies.

The statement of facts of the trial and the transcript of proceedings in the trial court have been filed in this proceeding. Most of the challenges urged by petitioner were found adversely to him by the Court of Criminal Appeals by its comprehensive opinion or by the trial court in his findings of fact. The opinion of the Court of Criminal Appeals and the findings of the trial judge on all except the hereinafter mentioned challenges are supported by the record and are adopted by this Court.

The issues concerning effectiveness of counsel, suppression of evidence by the prosecution, denial of speedy trial, and the use of prior convictions at the punishment phase could not be resolved from the record. Therefore, this Court appointed counsel to represent petitioner and conduct an evidentiary hearing on November 6, 1975.

The evidence at the evidentiary hearing established that the challenges that the prosecution has suppressed evidence, that petitioner was denied effective assistance of counsel, and that he was denied a speedy trial are without merit.

[1] Petitioner contended that his attorney had entered an agreement with the prosecutor for the

prosecutor to reveal to the attorney prior to trial all evidence which he proposed to use upon trial of the case. During the trial, the prosecutor developed from one of the minor witnesses that on one occasion petitioner had shown to him a number of photographs of young boys with whom he "had did it". No pictures were introduced into evidence. The district attorney explained that he always had an open file policy and would permit defense counsel in any case to examine his entire file. He had in fact shown his file to attorney for petitioner, including a stack of approximately fifteen pictures which had been delivered to him by the Sheriff's office. The prosecutor did not know the significance of the pictures until he was interviewing witnesses in preparation for trial. Those photographs had been in the file when defense counsel examined the file, however, and were not actually introduced into evidence. Petitioner failed to demonstrate that the prosecutor had suppressed evidence.

[2] Petitioner's challenge to the effectivness of counsel is limited to counsel's failure to object to the introduction of prior convictions during the punishment phase of the bifurcated trial. Petitioner admitted time and again that in general he was quite satisfied with the way counsel had conducted the defense and he had acknowledged to the Court of Criminal Appeals that appointed counsel had rendered effective service. However, three prior convictions were introduced into evidence during the punishment phase as a part of the criminal record of petitioner, upon two of which petitioner had no counsel, and the attorney failed to object to their admission. When objection to those prior convictions was raised upon direct appeal, the Court of Criminal Appeals of Texas refused to consider the challenges because no objection to them had been made at trial. For that reason, petitioner urges the

ineffectiveness of counsel for that limited purpose. The fact that prior convictions upon which petitioner was not represented by counsel were introduced at the trial will be discussed later in this opinion. A review of the full record, however, reflects that petitioner was not denied effective assistance of counsel. In fact, the assistance rendered by the appointed counsel was well within the standard announced in *MacKenna v. Ellis*, 5th Cir. 1960, 280 F.2d 592, 599, wherein the Court defined effective counsel as being counsel reasonably likely to render and rendering reasonably effective assistance.

[3, 4] Nor can this Court find merit in petitioner's contention that he was denied a speedy trial. Petitioner contends that he was arrested on September 20, 1971, indicted in November, 1971, and re-indicted on April 4, 1972. He contends further that from the time of his arrest in September, 1971, until March, 1972, he repeatedly wrote letters to the county attorney, to the district attorney, to the trial judge, and to anyone elso who he thought might listen and requested that counsel be appointed for him and that he be tried for the offenses charged. The district attorney explained at the evidentiary hearing that after the accused was arrested, the Sheriff's office notified the district attorney that petitioner was on probation for a like offense, of sodomy in Potter County, Texas. The Courthouse in Castro County, Texas, county of the offense and of trial, was being remodeled and the district attorney knew that it would be several months before petitioner could have a trial in Castro County, Texas. He contacted the district attorney of Potter County, Texas, where petitioner's probated sentence for sodomy had been adjudged and arranged to have petitioner transferred to Amerillo for hearing on motion to revoke that probation. In early 1972, however, the district attorney of Potter County,

Texas, notified the district attorney of Castro County, Texas, that on each occasion upon which they tried to get petitioner into the courtroom for trial, he had some mental or physical breakdown and the trial judge saw some indication of insanity. For that reason, the judge refused to have hearing on the motion to revoke probation until a sanity trial was conducted in the county of the primary offense and sometime during March, 1972, petitioner was returned to Castro County for trial. Counsel was then appointed to represent petitioner in Castro County, Texas. The district attorney testified that until petitioner was returned to Castro County for trial, he had never received any communication from petitioner requesting counsel. He indicated that he had a uniform practice to insure that counsel was appointed when he learned that an accused had no counsel. The length of delay between arrest and trial is only one of the elements to consider on the determination as to whether the constitutional right to speedy trial has been denied. It is a triggering device for inquiry as to the existence of the other elements. Under all the facts shown, petitioner has not established prejudice and has not shown that he has been denied his constitutional right to a speedy trial.

Resolution of petitioner's challenges depend almost entirely upon the admissibility of the prior convictions during the punishment phase of the bifurcated trial. One of the prior convictions was the probated sentence from Potter County, Texas, for the like ofense of sodomy. Petitioner had been represented by counsel at the time the probated sentence was entered, it was part of his criminal record, and it was properly admissible during the punishment phase.

[5] A second conviction was in the justice court of Deaf Smith County, Texas, for the misdemeanor offense of theft under five dollars for which petitioner was fined

twnety-five dollars. He was not represented by counsel at that time, but no jail sentence was assessed and constitutional right to counsel is not established. Although the justice court in Texas is not a Court of record, the admission of that conviction, without more, was harmless beyond a reasonable doubt.

[6] The primary defect is in the use of a prior felony conviction from Arkansas in 1960 for which petitioner received a penitentiary sentence of one year for cattle theft. Petitioner testified at the evidentiary hearing that he was arrested in March, 1960, in Arkansas for cattle theft and remained in jail for two or three weeks before he was taken before the judge to enter a guilty plea. Petitioner did not recall whether the trial judge advised him as to the nature of the charges, but he was adamant that he was not advised that he had the right to counsel, he was not offered an attorney, he was indigent, and he did not waive counsel. The record is clear that petitioner was not represented by counsel at the time of the challenged Arkansas conviction in 1960. He is entitled to question the Arkansas conviction in these collateral proceedings. *Craig v. Beto*, 5th Cir. 1972, 458 F.2d 1131.

[7, 8] The burden rests on the State of Texas to prove the petitioner knowingly and voluntarily waived counsel or that the error in admitting the evidence was harmless beyond a reasonable doubt. Respondent relies upon an entry upon the docket sheet of the Arkansas conviction that petitioner waived counsel, but produced no other evidence tending to show waiver. A minute entry does not provide sufficient basis to establish waiver of counsel. *Dunlin v. Henderson*, 5th Cir. 1971, 448 F.2d 1238; *Gutierrez v. Estelle*, 5th Cir. 1973, 474 F.2d 899.

[9-11] There can be no question but that petitioner had a constitutional right to counsel at the time of the

Arkansas conviction. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). To permit a conviction obtained in violation of *Gideon* to be used against a person either to support guilt or to enhance punishment erodes the principle of that case. *Burgett v. Texas*, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967). The use of prior convictions, void because uncounseled, for impeachment purposes deprives an accused of due process of law. *Loper v. Beto*, 405 U.S. 473, 92 S.Ct. 1014, 31 L.Ed.2d 374 (1972). In this case, the uncounseled conviction was not alleged for enhancement purposes but was introduced as part of petitioner's "prior criminal record"under the provisions of Article 37.07, Texas Code of Criminal Procedure and was available to the jury for consideration in the assessment of the fifteen year sentence.

Petitioner had a constitutional right to counsel on the 1960 Arkansas conviction, he was not represented by counsel and he did not knowingly and voluntarily waive the right to counsel. A second issue needs to be determined, that is, did the use of the prior uncounseled conviction against petitioner constitute harmless error. If an error was of constitutional dimension (and *Loper v. Beto* makes the error in this case one of constitutional dimensions), reversal was once almost automatic. While this is no longer always the case, constitutional errors still receive different treatment from all other errors and are still far more likely to require a new trial than nonconstitutional errors. Saltzburg, *The Harm of Harmless Error*, 59 Virginia Law Review 988 (1973). In *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), Justice Black, writing for a seven-judge majority, first considered the question whether a federal or state rule for judging the impact of error should govern constitutional violations and opted in favor of the federal rule, next dtermined that there

could be harmless constitutional error, and third promulgated a rule of measuring the effect of error as follows:

> "Before a federal constitutional error can be held harmless, the Court must be able to declare a belief that it was harmless beyond a reasonable doubt."

[12] Under the evidence adduced in this case and where punishment of fifteen years imprisonment is assessed by the jury, this Court is unable to say that the introduction of the uncounseled 1960 Arkansas conviction at the penalty stage of the bifurcated trial was harmless error beyond a reasonable doubt. Although the error is to penalty alone, petitioner is entitled to an entirely new trial.

It is, therefore, ORDERED that:

(1) Writ of habeas corpus issue on behalf of BUFFORD LENELL McDONALD.

(2) Petitioner, BUFORD LENELL McDONALD, be, and he is hereby, discharged from the custody of W. J. ESTELLE, JR., Director of Texas Department of Corrections, on account of his challenged conviction in Cause No. 940 in the District Court of Castro County, Texas, wherein he received sentence of fifteen years imprisonment in Texas Department of Corrections.

(3) The release of petitioner from custody be stayed for a period of ninety days from the date hereof; that if within such time the State of Texas shall make demand therefor, petitioner shall be transferred by respondent to the proper authorities of Castro County, Texas, for new trial; but if no such demand be made within ninety days from the date hereof, at the termination of such ninety-day period, respondent shall immediately discharge petitioner, BUFFORD LENELL McDONALD, from further custody on account of his present conviction.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1975

No. 73-1576

D. C. Docket No. CA-2-75-79

BUFFORD LENELL McDONALD,

Petitioner-Appellee,

versus

W. J. ESTELLE, JR., DIRECTOR,
Texas Department of Corrections,

Respondent-Appellant.

Appeal from the United States District Court for the
Northern District of Texas

Before **THORNBERRY, CLARK and TJOFLAT,**
Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the **Northern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;**

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, affirmed.

August 6, 1976

Issued as Mandate:

Appendix B

APPENDIX C

United States Court of Appeals

FIFTH CIRCUIT

OFFICE OF THE CLERK

Edward W. Wadsworth
Clerk

600 Camp Street
New Orleans, La.70130
Telephone 504-589-6514

October 4, 1976

TO ALL COUNSEL OF RECORD

No. 76-1576 - Bufford Lenell McDonald v. W. J. Estelle, Jr., etc.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

E. W. Wadsworth, Clerk

by S/S

Deputy Clerk

/smg
cc: Mr. Patrick P. Rogers
Mr. James Durham, Jr.

APPENDIX D

Bufford Lenell McDONALD, allas Joe McDonald, Appellant,

v.

The STATE of Texas, Appelle.

No. 48408.

Court of Criminal Appeals of Texas.

July 10, 1974.

Rehearing Denied Sept. 18, 1974.

Defendant was convicted in the 64th Judicial District Court, Castro County, John T. Boyd, J., of sodomy and he appealed. The Court of Criminal Appeals, Onion, P.J. held that defendant's warrantless arrest allegedly without probable cause, did not require reversal, since there was no confession or fruits of any search incident to the arrest introduced in evidence; that defendant had no right to any examining trial; that the complaining witness' testimony was adequate to identify defendant as perpetrator of the offense; that it was not necessary that evidence show that the complaining witness' sexual organ penetrated defendant's mouth; that the sodomy statute was not unconstitutional; that the trial court's charge was not incorrect because it failed to allege a specific date for the commission of the offense; that because of his tender age, complaining witness was not shown to be accomplice witness as a matter of law; that evidence of extraneous offenses committed by defendant were admissible in evidence; and that defendant did not make timely objection to the trial court's admission of three prior convictions at the penalty stage of the trial.

Affirmed.

1. Criminal Law — 1166(1)

Warrantless arrest, allegedly without probable cause, did not require reversal, where there was no confession or fruits of any search incident to said arrest introduced into evidence.

2. Criminal Law — 224

Where indictment had been returned against defendant by grand jury, he had no right to an examining trial. Vernon's Ann.C.C.P.arts. 15.17, 16.01.

3. Criminal Law — 566

Where complaining witness identified defendant only as "Buddy," but other witnesses clearly identified defendant and testified that he was known as "Buddy," evidence was sufficient to identify defendant as perpetrator of offense charged.

4. Sodomy — 1

Penetration of the mouth is not an essential element of the offense of use of the mouth on the sexual parts of another human being for the purpose of having carnal copulation. Vernon's Ann.P.C. art. 524.

5. Sodomy — 1

Statute probhibiting use of the mouth on the sexual parts of another human being for the purpose of having carnal copulation is not unconstitutional. Vernon's Ann.P.C.art. 524.

6. Indictment and Information — 176

State is not bound by date on or about which offense is alleged to have been committed, but conviction may be had upon proof that offense was committed any time

prior to the return of the indictment that is within the period of limitation. Vernon's Ann.C.C.P.art.21.02, subd.6.

7. Criminal Law — 507(7)

Nine-year-old complaining witness who testified, in sodomy prosecution, that he knew act was wrong but did not know that it was a crime, was not accomplice witness as a matter of law.

8. Criminal Law — 369.2(5),370

Where State's only direct evidence in sodomy prosecution was testimony of nine-year-old complaining witness, and defense included an alibi and evidence of defendant's good moral character, evidence of extraneous offenses was admissible in order to rebut alibi defense, to show identity, to show defendant's guilty knowledge, and to show the probability of the act charged and the unnatural atttention of defendant toward the complaining witness.

9. Criminal Law — 372(7)

In sodomy prosecution, evidence of extraneous offense, similar to offense charged was admissible to show a continuing course of conduct, even though said offense occurred one year prior to offense for which defendant was on trial.

10. Criminal Law — 1042

Where defendant made no objection to admission of three prior convictions at penalty stage of trial, nothing was presented for review.

Harold D. Sanderson, Amarillo, for appellant.

Tom Hamilton, Dist. Atty., Plainview, and Jim D. Vollers, State's Atty., Austin, for the State.

OPINION

ONION, Presiding Judge

This appeal arises out of a conviction for sodomy wherein the punishment was assessed by the jury at fifteen (15) years.

Appellant has filed pro se briefs asserting some nineteen grounds of error.[1]

[1] Initially, appellant contends his warrantless arrest was without probable cause. It appears from the record that the arrest, some eight days after the alleged offense, was made without a warrant after the arresting officer had talked to some young boys. There were no confessions or fruits of any search incident to arrest introduced. We find no reversible error.

[2] Next, appellant complains that he was not accorded an examining trial as required by Article 15.17, Vernon's Ann.C.C.P.

The State points out in its brief that the record reflects the original complaint filed alleging sodomy involved another complaining witness, Tony J____, for which offense appellant was subsequently indicted. After such complaining witness moved out of town, the State

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[1]Appellant, represented by court-appointed counsel at trial, asked the discharge of his counsel following trial though acknowledging his effectiveness. Though it appears the indigent appellant voluntarily and knowingly waived the right to counsel on appeal, the trial court appointed appellate counsel to advise and assist appellant on appeal, which aid and assistance appellant has acknowledged. Appellate counsel has also filed a brief adopting the pro se briefs and elaborating on the same.

sought the instant indictment directly from the grand jury without filing a complaint in a Justice of the Peace Court. In Brown v. State, 475 S.W.2d 938 (Tex.Cr.App.1971), this court held that the return of an indictment terminates any right to an examining trial. See Article 16.01, Vernon's Ann.C.C.P., and Harris v. State, 457 S.W.2d 903, 907 (Tex.Cr.App.1970), and cases there cited. Once an indictment, a true bill, has been presented or returned by a grand jury, the principal purpose and justification for such preliminary hearing has been satisfied.

The indictment, omitting the formal part, alleged that one or about September 12, 1971, appellant did "use his mouth on the sexual parts of another human being, to wit, Clemente ____, for the purpose of having carnal copulation . . . ."

The record reflects that on Saturday, September 11, 1971, Clemente ____, his brother, Luis, and a friend, Tony ____, went to the movie theater across the street from the courthouse in Dimmitt. While at the theater, they met appellant, who gave each of them a dime with which to buy candy. After purchasing the candy, the boys went in to watch the movie and appellant sat with Clemente.

The next day, Sunday, September 12th, the three boys went to a hotel across the street from the courthouse. When they arrived, appellant was watching television. At approximately 3 to 3:30 p.m. Clemente went to Room 12 with appellant. While there, appellant gave Clemente a dollar, had him get on the bed, removed his pants, and placed his mouth on Clemente's penis.

[3] Appellant challenges the sufficiency of the evidence to sustain the conviction on several grounds. Among them is the complaint, as we understand it, that the complaining witness' testimony failed to identify

him as the perpetrator of the offense, was vague, indefinite and uncertain. The record reflects that Clemente testified:

"Q Now, are you acquainted—do you know Buddy McDonald?

"A Yes

"Q Is that the man sitting right over here?

"A Yes."

Thereafter, he referred to the man who had committed the offense simply at "Buddy." While the interrogation above, standing alone, leaves open to argument whether the man identified was in fact the appellant—other witnesses offered by the State clearly identified the appellant and testified he was known as Buddy McDonald. The jurors were judges of the facts, the credibility of witnesses, etc., and we cannot say the evidence is insufficient on the ground urged.

[4] Appellant also urges that the evidence is insufficient to sustain the conviction since it was not shown that the complaining witness' sexual organ penetrated his (appellant's) mouth.

In Sinclair v. State, 166 Tex.Cr.R. 167, 311 S.W.2d 824 (1958), this court held that penetration of the mouth is not an essential element of the offense of use of the mouth on the sexual parts of another human being for the purpose of having carnal copulation as proscribed by Article 524, Vernon's Ann.P.C. It was noted that use of the mouth on the sexual parts of another for the purpose of carnal copulation is sufficient to sustain a conviction for sodomy.

The complaining witness testified that appellant placed his mouth "on" his (the witness') penis. Such

evidence was sufficent under the statute to sustain the conviction.[2]

Appellant also complains that the court fundamentally erred in defining carnal copulation in the charge as requiring that " . . . the male sexual organ must be shown to have penetrated the mouth of the defendant . . . ."

There was no objection to the charge, nor was there a special requested charge. As noted above, penetration was not required, and the charge was more favorable than that to which the appellant was entitled. The jury having, under all the evidence, resolved the issue against him, appellant is not in a position to complain now.

[5] Appellant also challenges the constitutionality of Article 524, Vernon's Ann.P.C. We have previously held the statute constitutional. Pruett v. State, 463 S.W.2d 191 (Tex.Cr.App.1970), appeal dismissed for want of a substantial question, Pruett v. Texas, 402 U.S. 902, 91 S.Ct. 1379, 28 L.Ed.2d 643 (1971); Buchanan v. State, 471 S.W.2d 401 (Tex.Cr.App.1971), cert. denied, Buchanan v. Texas, 405 U.S. 930, 92 S.Ct. 984, 30 L.Ed.2d 804 (1972); Everett v. State, 465 S.W.2d 162 (Tex.Cr.App.1971). We adhere to such decisions.

[6] Appellant also urges the court's charge was incorrect because it failed to allege a specific date therein for the commission of the offense, using instead the "on or about the 12th day of September, 1971" allegation in the indictment.

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[2]For the same reason, appellant's complaint that the indictment is vague, indefinite and uncertain in its failure to allege that the appellant had carnal copulation with the complaining witness is without merit. Carnal copulation is not required. The act need be done only for the purpose of having carnal copulation. Sinclair v. State, supra. The indictment was sufficient under the statute.

It is well settled under Article 21.02, Sec. 6, Vernon's Ann.C.C.P., that the State is not bound by the date on or about which the offense is alleged to have been committed, but a conviction may be had upon proof that the offense was committed any time prior to the return of the indictment that is within the period of limitation. Glenn v. State, 436 S.W.2d 344 (Tex.Cr.App.1969).

The evidence here showed the offense occurred on September 12, 1971, and was sufficient to show it was committed prior to the presentment of the indictment and was within the period of limitation.

The court's charge was not incorrect.

[7] Although the court submitted the fact issue to the jury as to whether the complaining witness was an accomplice witness, appellant complains of the trial court's failure to charge the jury the Clemente _____ was an accomplice witness as a matter of law. Further, he contends that since Clemente was the only witness to the act alleged in the indictment, the evidence is insufficient because Clemente's testimony was not corroborated. See Article 38.14, Vernon's Ann.C.C.P.

This contention is based on the fact that Clemente testified on cross-examination as follows:

"Q All right. Did you understand back in September of '71, at the time that this happened, did you know whether this was right or wrong, what he did to you? Do you know whether that was the right thing to do or the wrong thing to do?

"A Wrong thing.

"Q What?

"A The wrong thing.

"Q All right. And did you know whether it was a crime or not to do this type of thing.

"A No.

"Q Okay. But you did know and understant that it was wrong?

"A (Witness nods his head affirmatively)

"Q And did he force you in any way to do this? Did he use any kind of physical force or threats?

"A No.

"Q You did it willingly?

"A Uh-huh."

The record show that Clemente was ten years old at the time of trial. His date of birth or his age at the time of the offense is not shown; however, since the offense occurred more than sixteen months prior to trial, it appears that he was eight or nine years old at that time.

By their verdict the jury found that Clemente was not an accomplice witness.

Prior to its amendment in 1967, Article 30, Vernon's Ann.P.C., provided that no child between the ages of nine and thirteen was criminally responsible for any offense unless it appeared that such child "had discretion sufficient to understand the nature and illegality of the act." Based on such statute in Slusser v. State, 155 Tex.Cr.R. 160, 232 S.W.2d 727 (1950), we conceived the correct rule relative to a child witness to be as follows:

"(1) Each case must be considered upon its own facts determining whether the witness is to be

considered a victim of the unlawful act of another or as a participant therein, and therefore an accomplice.

"(2) If inferences are to be indulged, the correct inference would be that a child over nine and under thirteen years of age possesses sufficient discretion and knowledge to be an accomplice.

"(3) If from the evidence, a question is raised as to whether the child between the ages of nine and thirteen years voluntarily participated in the criminal act, or as to whether such child, so participating, is possessed of sufficient discretion to know the act to be criminal, and to have the necessary criminal intent, such issue or issues should be submitted to the jury in order that the jury may, be resolving such issue, determine whether the witness is to be considered an accomplice witness.

"(4) If the record as a whole shows that the child witness has such discretion, and voluntarily participated in the unlawful act, then the testimony of the witness should be dealt with as that of an accomplice witness."

In 1967 Article 30 supra, was amended to read as follows:

"Section 1. No person may be convicted of any offense, except prejury, which was committed before he was 15 years of age; and for perjury only when it appears by proof that he had sufficient discretion to understand the nature and obligation of an oath." Acts 1967, 60th Leg., p. 1086, ch. 475, § 7.

In Carnathan v. State, 478 S.W.2d 490 (Tex.Cr.App.1972), we stated:

"An accomplice witness has also been described as a person, who, either as a principal, accomplice, or accessory, was connected with the crime by unlawful act or omission on his part, transpiring either before, at the time of, or after the commission of the offense, and whether or not he was present and participated in the crime. See Article 38.14, supra, n. 2.

"Thus, it has been said that the rule requiring corroboration of accomplice testimony does not apply to one whose connection with the offense was not such as to render him punishable under the statute denouncing the offense. See 24 Tex.Jur.2d, Evidence, § 690, p. 311, n. 17; Devault v. State, 449 S.W.2d 235 (Tex.Cr.App.1970).

" . . . Furthermore, even though the witness was an actor in the criminal transaction, he is not regarded as an accomplice if he did not act knowingly or willingly, *or if he was too young to be criminally responsible.*" 24 Tex.Jur.2d, Evidence § 690, p. 313 (emphasis supplied)."

As in Carnathan v. State, supra, we need not determine what effect, if any, the amendment to Article 30, supra, may have and upon Slusser v. State, supra, and other holding.[3]

In Van Buskirk v. State, 492 S.W.2d 279 (Tex.Cr.App. 1973), we stated:

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[3]In Gottschalk v. State, 157 Tex.Cr.R. 276, 248 S.W.2d 473 (1952), a thirteen year old boy was held to be an accomplice witness. In Hinson v. State, 152 Tex.Cr.R. 159, 211 S.W.2d 750 (1948), the witness was eleven. In Gallager v. State, 131 Tex.Cr.R. 254, 97 S.W.2d 954 (1936), and Gottschalk v. State, supra, the witnesses were fourteen or almost fourteen years of age. All of these witnesses were determined to be accomplice witnesses under the particular facts of each case. See also Bolin v. State, 505 S.W.2d 912 (Tex.Cr.App.1974).

We do note that Article 30, supra, has been repealed by the new Penal Code. See now Section 8.07 of the new Code, V.T.C.A.

"Where there is any doubt as to the fact that a given witness is an accomplice witness and such fact issue is submitted to the jury, such procedure is sufficient even though the evidence appears largely to preponderate in favor of the fact that such witness is an accomplice witness as a matter of law. Lopez v. State, 92 Tex.Cr.R. 97, 242 S.W. 212 (1922); Gonzales v. State, 441 S.W.2d 539 (Tex.Cr.App.1969) and Allen v. State, 461 S.W.2d 622 (Tex.Cr.App. 1970)."

Under the facts of this case we hold that because of his tender age Clemente was not shown to be an accomplice witness as a matter of law. A fact question as to his being an accomplice witness was presented, the trial court so charged the jury, and the jury resolved that question against appellant. Having determined that the prosecuting witness was not an accomplice witness no corroboration was required.

[8] Appellant complaints of the admission into evidence of certain extraneous offenses at the guilt-innocence stage of the bifurcated trial.

The State made no attempt to offer evidence of extraneous offenses during its case in chief.[4] Appellant then called Mone _____, a young boy, who testified that he had lived at Dimmitt two or three years, knew the appellant, had had an occasion to go hunting with him and was with him the night he was arrested. He related on that date he and his brother, Luis, and Clemente had all been with the appellant. He testified that the

[4]And this was so despite the vigorous crossexamination of the State's witnesses and the attempt to impeach Clemente's testimony that the appellant had committed the act upon him twice by showing in a deposition he had testified it happened only once.

appellant had never done anything "bad" to him, and he never saw the appellant do anything to any other boy.[5]

In addition the appellant offered evidence of alibi. The pastor of a Dimmitt church and his wife testified that on Sunday, September 12, appellant attended Sunday School and Church from 9:45 a.m. until noon. His employer testified he picked up the appellant at his hotel around noon that day, that they went to eat and then drove to Friona to pick up a suitcase and trunk. According to the employer, they did not return to Dimmitt until 3:30 or 4 p.m. He described the appellant as an "A-one hand." Ruby Hall testified that she went to a local cafe about 4:45 p.m. that date for pie and coffee and appellant was there when she arrived. Upon leaving at 5:30 p.m., she inquired if appellant was coming to church, and at 6 p.m. she saw him at church. The pastor of the church corroborated the fact that appellant was at church from about 6 to 10 p.m.

In rebuttal the State recalled Luis, Clemente's brother, who testified that after they met the appellant he had committed an act of sodomy on him. His testimony was equivocal on whether it was before or after the alleged act upon Clemente.

The State also recalled Clemente, who testified that on the day of the offense appellant showed him pictures of appellant's "friends" who he stated were boys "he had done it to."

Shane _____, age nine, testified that appellant had propositioned him to permit an act of sodomy and he consented, but the appellant "didn't get to it."

Tony was recalled and testified that on two or three occasions he had gone to appellant's hotel room where

[5]On cross examination he admitted that appellant had four of five times propositioned him to allow appellant to commit sodomy on him.

the appellant had given him money and had placed his mouth on the witness' "tee-tee."

Jesse ____, age twelve, who lived in Hereford, testified that in the summer three years before when he was nine he met appellant at a skating rink in Herford and that the appellant paid for his admission to the rink. He related that on about ten occasions appellant would give him a dollar and then place his (appellant's) mouth on the witness' penis.

Appellant objected to the testimony of these witnesses on the ground that it showed extraneous offenses. He further objected to Jesse's testimony on the ground that it was too remote.

Prior to the time the extraneous offenses were introduced, the State's evidence was in the following posture:

(1) Clemente was the only witness to the acts alleged in the indictment and a fact issue had been raised as to whether he was an accomplice witness which would require other corroboration evidence which which would tend to connect appellant with the offense.

(2) The testimony of the State's witnesses, including Clemente, had been contradicted through cross-examination and defense testimony.

(3) The evidence for the defense tended to leave the impression with the jury that appellant was a church-going, hardworking man, and therefore unlikely to commit an offense such as that alleged in the indictment.

(4) The defensive testimony relative to alibi was clearly calculated to convince the jury not only that appellant did not commit the offense alleged,

but also that he had no guilty knowledge of such offense; or, that such offense had not been committed.

In 23 Tex.Jur.2d, Evidence, Sec. 194, pp. 294-295[6] it is stated:

"As a general rule, in criminal cases the accused can be convicted, if at all, only be evidence that shows that he is guilty of the offense charged. Consecquently, evidence that he has committed other crimes that are remote and wholly disconnected from the offense with which he is charged is ordinarily inadmissible."

In Johnson v. State, 418 S.W.2d 522 (Tex.Cr.App.1967) defendant was convicted under an indictment which alleged that he had used his mouth on the sexual parts of one Graham for the purpose of having carnal copulation. After detailing the evidence and quoting the rule stated in 23 Tex.Jr.2d supra, this court addressed itself to the question of the admissibility of extraneous offenses. There we stated:

"The rule against admitting evidence of other crimes by the accused is inapplicable if such evidence logically tends to show his guilt of the offense charged. In other words, relevant evidence that tends to prove that the accused committed the crime charged is not inadmissible simply because it may also reveal that he has committed other crimes.

"Evidence of the commission of other crimes by the accused is admissible as exception to the general rule to show plan or system; to rebut some defensive theory and in cases such as sodomy, as evidencing the probability of

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[6]See Albrecht v. State, 486 S.W.2d 97 (Tex.Cr.App.1972), for the general rules relative to extraneous offenses.

the act charged and the unnatural attention toward the complaining witness, victim or accomplice."

We then discussed the defensive evidence:

"Appellant's testimony was to the effect that Graham and other boys had been engaging in homoxexual activities with a man and that he counseled Graham not to go to the man's house again. He offered evidence to the effect that the reputation of Graham was that he was a troublemaker at school and his reputation for truth and veracity was bad.

"Appellant testified that the act charged in the indictment did not occur. He denied the hypnotism and vibration routine shown by the testimony of the boys. He testified that he was not in his apartment at the time the state's testimony showed the offense was committed but was in Amarillo and he also raised as a defense that Grahm had framed him and the boys were carrying out a threat to start rumors and accuse him of being "a homosexual,"* * *"a damned queer," because he did not meet Graham's demand that he give him $100. All of such testimony of appellant was rebutted by the testimony of the boys denying that threats were made or money was demanded."

In Johnson v. State, supra, we held that extraneous offenses committed upon Graham and other were to be admissible. The defense presented in the instant case, when considered with the contradictions and discrepancies in the State's evidence, was at least as strong as that presented in *Johnston*.

Although unnecessary to our decision on these contentions, we do note that there are similarities[7] between the primary offense and the extraneous offenses:

(1) In each instance, except Shane, appellant placed his mouth on the sexual parts of another.

(2) In each instance the victim was eight or nine years old.

(3) In most instances the appellant gave the victim money.

(4) In most, if not all, of the instances, the eight or nine year old victim was alone with appellant at the time the offenses were committed.

We hold that the extraneous offenses were admissible to rebut the defense of alibi, to show identity, to show appellant's guilty knowledge, and, in view of the defensive evidence, to show the "probability of the act charged and the unnatural attention" of appellant toward the prosecuting witness. Johnston v. State, supra, at 527. Further, we observe that Clemente's reubttal testimony appears to be admissible as part of the "res gestae" of the offense charged.

[9] Neither are we impressed with appellant's contention that the act upon Jesse _____ was too remote.

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[7]Cf. Williams v. State, 481 S.W.2d 815 (Tex.Cr.App.1972), indecent exposure; Williams v. State, 490 S.W.2d 604 (Tex.Cr.App.1973). statutory rape; O'Neal v. State, 421 S.W.2d 391 (Tex.Cr.App.1967), enticing a minor; Ford v. State, 484 S.W.2d 727 (TexCr.App.1972), murder; Ransom v. State, 503 S.W.2d 810 (Tex.Cr.App.1974), robbery.

In Robledo v. State, 480 S.W.2d 401 (Tex.Cr.App.1972), we held that introduction of an extraneous offense which occurred four years and three months before the offense on the trial was reversible error since the extraneous offense was too remote. Yet in the instant ease, the extraneous offense and the offense on trial are separated by approximately one year.[8] This fact coupled with the other extraneous offenses occurring near the date of the primary offense, is sufficient to show a continuing course of conduct. For these reasons, we are unable to hold that such testimony was too remote. The testimony showed and explained the unnatural attention and the unnatural conduct which appellant showed toward Clemente. Under these facts, it was relevant, admissible and not too remote.

Appellant's contentions are without merit.

[10] Appellant further advances the contention that the court erred in admitting three prior convictions at the penalty stage of the trial since they were constitutionally inadmissible. He candidly admits there were no objections. He urges that his prior Arkansas conviction was obtained without counsel. The record reflects he waived counsel. He contends his prior 1968 Potter County conviction for sodomy was inadmissible because he was placed on probation and it was not a final conviction. Article 37.07, Sec. 3(a), Vernon's Ann.C.C.P., however, probides "a probated or suspended sentence that has occurred prior to trial" may be introduced as a part of an accused's prior criminal record. The third conviction was for misdemeanor theft under five dollars in a Justice of the

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[8]At the trial in January of 1973, the witness Jesse ____ testified that the extraneous offense occurred in "summer" three years ago; i.e., in 1970. The offense on trial was alleged to have occurred on September 12, 1971.

Peace Court in Deaf Smith County. Appellant complains now on appeal that he was without counsel at the time of such conviction. It appears that since this was a conviction in court *not of record*, which was not material to the offense charged, it was not admissible under Article 37.07, Sec. 3(a), supra. As earlier noted, however, no objection of any kind was made. Nothing is presented for review.

We have carefully examined appellant's other grounds of error and do not find them to have merit, nor do we find that a discussion of the same would add to the jurisprudence of this State. They are overruled.

The judgment is affirmed.

APPENDIX E

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE CLERK

Edward W. Wadsworth
Clerk

600 Camp Street
New Orleans, La.70130

October 21, 1976

Mr. Patrick P. Rogers
Assistant Attorney General
P. O. Box 12548
Capitol Station
Austin, Texas 78711

No. **76-1576 - Bufford Lenell McDonald v. W. J. Estelle, Jr., Etc.**

MANDATE STAYED TO AND INCLUDING **November 20, 1976**

Dear Counsel:

The court has this day granted a stay of the issuance of the mandate to the date shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21 (1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari,

and therefore will not be routinely prepared by this office (38LW 3502).

A copy of the opinion, judgment and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

E. W. Wadsworth, Clerk

By _____

enc.
cc: Mr. James Durham, Jr.

APPENDIX F

PENITENTIARY COMMITMENT

State of Arkansas,
County of **Pope**

In the **Pope** Circuit Court
Proceedings **March 16, 1960**

State of Arkansas,
vs. No. 2864
Bufford Lenell McDonald

Indictment for **Grand Larceny**

This day comes the State of Arkansas by **George F. Hartje, Jr.** Prosecuting Attorney, and comes the defendant in proper person in custody of the Sheriff and **being advised of the nature of the charge and punishment prescribed, waives benefit of counsel, enters a plea of guilty to grand larceny. Punishment fined at one year in the State Penitentiary. No objection being made, judgment and sentence pronounced and defendant, Bufford Lenell McDonald ordered committed to the State Penitentiary for a period of one year. Ordered and adjudged that defendant, Bufford Lenell McDonald pay court costs.**

It is therefore considered, ordered and adjudged by the Court that said defendant be remanded into the custody of the Sheriff of **Pope** County, and to be by him safely and speedily transported to the Penitentiary House or State Convict Farm or Camps of the State of Arkansas, and there confined at hard labor for the period of **one year** and that the State of Arkansas do have and recover of said defendant all the costs of this prosecution and have execution therefor. It is further ordered by the Court, that the Clerk of this Court make out and deliver to said Sheriff a certified copy of the foregoing judgment to be by him delivered to the Agent or Keeper of said Penitentiary as sufficient authority for him to receive and confine the said **Bufford Lenell McDonald** in the manner aforesaid.

State of Arkansas,
County of **Pope**

Audrey Strait
Circuit Judge

I, **Louis Hood** Clerk of the Circuit Court for said County and State, do hereby certify that the above is a true and perfect transcript of the judgment and sentence of said Court in the cause therein mentioned.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court,

this **16th** day of **March**, 1960.

S/S Louis Hood Clerk.

(SEAL)

By _____ D. C.

APPENDIX G

SECOND STAGE OF TRIAL

TRIAL AS TO PUNISHMENT

* * * * *

THE COURT: All right. Ladies and gentlemen of the jury, it now becomes your responsibility to assess the punishment to be given in this phase of the case. And in order to assist you in this, why, we move to the production of any testimony that either of the parties might have in connection with this phase of the trial.

Mr. Hamilton, will you --

MR. HAMILTON: Your Honor, at this time the State would offer into evidence --

THE COURT: Excuse me just a minute, If you have witnesses, let's swear them.

MR. HAMILTON: Yes.

(Witnesses sworn by the
(Court and instructed as to
(the rule.

MR. HAMILTON: At this time, Your Honor, the State would offer into evidence a certified copy of the indictment, judgment and sentence in Case No. 2864, styled State of Arkansas versus Bufford Lenell McDonald, in the Pope Circuit Court, of Pope County, Arkansas, dated March 16, 1960, wherein Bufford Lenell McDonald was convicted of the offense of grand larceny, was assessed a term of one year in the penitentiary.

THE COURT: Mr. Miller, have you hand an opportunity to examine this document? (Handing instrument to Mr. Miller and the Defendant).

[PRIOR CONVICTION
NO. 1]

MR. MILLER: **We have no objection, Your Honor.**

THE COURT: The record will show the receipt of this document as State's Exhibit No. 1.

(Thereupon, State's Exhibit
(No. 1 was marked for
(identification and received
(in evidence.

MR. HAMILTON: Call Mr. Booch.

* * * * *

STATE'S EVIDENCE

* * * * *

Whereupon,

E. L. BOOCH,

called as a witness on behalf of the State of Texas, being first duly sworn, testified as follows, to-wit:

DIRECT EXAMINATION

BY MR. HAMILTON:

Q State your name, please, sir.

A E. L. BOOCH

Q Where do you reside, Mr. Booch?

A Amarillo, Texas, Potter County.

Q What is your occupation, sir?

A I'm the Chief Probation Officer for the District

Q How long have you been Chief Probation Officer for that Court?

A Approximately nine years.

Q Are you acquainted with Bufford Lenell McDonald?

A I am.

Q Is he one and the same person who is sitting in the courtroom today?

A He is.

Q Would you point him out to us, please, sir?

A He is sitting next to his counsel.

Q Are you presently serving as the Probation Officer for Bufford Lenell McDonald?

A Not in that sence, no. I have the responsibility of all the probationers, and I gave him to another man for supervision.

Q But he is on probation out of your office?

A He is.

Q Now, sir, I'll ask you if you were present in Court on November 18, 1968, when Bufford Lenell McDonald was convicted in the 47th District Court of Potter County, Texas.

A I was.

Q What was that conviction for, sir?

A Charge of sodomy.

Q And was he convicted of that offense?

A He was.

Q Was he placed on probation?

A He was.

Q What was the term of his probation?

A Ten years.

MR. HAMILTON: Pass the witness

* * * * *

[PRIOR CONVICTION NO. 2]

MR. MILLER: No questions.

(Witness excused)

MR. HAMILTON: At this time we offer into evidence a certified copy of the indictment, the judgment and the order placing the Defendant, Bufford Lenell McDonald on probation in Cause No. 13,832, in the 47th District Court of Potter County, Texas, in case styled The State of Texas versus Bufford Lenell McDonald, wherein on the 18th day of November, 1968, he was convicted of the offense of sodomy, was assessed a term of ten years in the penitentiary, and was placed on probation.

(Thereupon, State's Exhibit (No. 2 was marked for (identification.

THE COURT: The record will show the receipt of this instrument as State's Exhibit No. 2.

MR. HAMILTON: Call Harold Wheeler.

* * * * *

Whereupon,

HAROLD WHEELER,

called as a witness on behalf of the State of Texas, being first duly sworn, testified as follows, to-wit:

DIRECT EXAMINATION

BY MR. HAMILTON:

Q State your name, please sir.

A Harold Wheeler.

Q What is your present occupation, Harold?

A Adult Probation Officer for 69th District.

Q How long have you served in this capacity?

A Almost two years.

Q And that is for Deaf Smith County, isn't it?

A It's Deaf Smith and five other counties to the north.

Q That's right. Now, what was your occupation prior to that time?

A Well, I was a deputy sheriff and investigator for the District Attorney's office in Deaf Smith County.

Q Are you acquainted with Bufford Lenell McDonald?

A Yes, sir.

Q Is he present in Court today?

A Yes, sir.

Q Would you point him out to us, please, sir?

A Man there with the green shirt on.

Q I'll ask you, sir, if on January 15, 1971, you had occasion to appear in the Justice of the Peace Court in Cause No. 21,912, Deaf Smith County, Texas, with Bufford McDonald.

A Yes, sir, I did.

Q Was a complaint filed against him by you?

A Yes, sir.

Q And what was that complaint, please, sir?

A Theft under five.

Q Theft under five dollars?

A Yes, sir.

Q Was he convicted of that offense?

A Yes, sir.

Q Is he the same person who is present in Court today.

A Yes, sir.

MR. HAMILTON: Your Honor, we offer into evidence a certified copy of a judgment of conviction in Justice of the Peace Court, styled State of Texas versus Joe McDonald, Cause No. 21,912, wherein Mr. McDonald was convicted of the offense of theft under five dollars.

THE COURT: Mr. Miller, have you had an opportunity to examine it?

MR. MILLER: Not yet, Your Honor.

(Thereupon, State's Exhibit (No. 3 was marked for (identification and handed (to Mr. Miller.

[PRIOR CONVICTION NO. 3]

MR. MILLER: No objection.

THE COURT: The record will show the receipt of this instrument as State's Exhibit No. 3

MR HAMILTON: Pass the witness.

MR. MILLER: We have no questions.

THE COURT: Thank you, Mr. Wheeler, Is there objection to his being excused?

MR. HAMILTON: No.

MR. MILLER: No.

APPENDIX H

October 21, 1976

Bufford McDonald
No. 235330
Box 16 Dorm 5
Lovelady, Texas 75851

Honorable Robert Bunty
Castro County Attorney
Courthouse
Dimmitt, Texas 79027

RE: Cause Number 940

Dear Mr. Buntyn;

Assuming that the state does not pursue certioari to the Supreme Court; I will be returned to court in the near future. Please be advised that I would be willing to enter into an agreement to enter a guilty plea to **time served** if it would be "**probated.**" The Texas Code of Criminal Proceedure, article 42.12 sec. 3c provides that the court may grant a probation to a defendant regardless of his past criminal record. This would give Castro County their conviction, and, it would give me a probation that was "lived down". As you know, this would also lessen the burden of the court and would save time and expense of the county. If this would be agreeable to you, the judge and District Attorney, then perhaps we could work it out. Under no other circumstances would I plead guilty.

Hope you have been doing well in lieu of the odd ball weather that has prevailed upon in the panhandle. With best wishes I remain,

Cordially

S/S Bufford McDonald

cc: file

November 4, 1976

Bufford McDonald 235330
Box 16 Dorm 5
Lovelady, Tex. 75851

Mr. Robert Buntyn
Castro County Attorney
Dimmitt, Texas 79027

Re: Castro Co. No. 940

Dear Bob,

I hereby rescind my offer of plea bargain in the above numbered cause. When I offered the plea in my last letter, I done so, without expecting the state to seek certiorari. If, after the November 20th date of which the 5th Circuit has stayed their mandate, the state has not filed certiorari, then I will offer the plea I suggested to you, but if the state files certiorari, then I have no intention of pleading as I offered. I offered the plea as a good faith bargain, but I withdraw it at this time until I see whether or not the state files certiorari.

Best Wishes,

S/S Bufford

cc: Mr. James D. Durham
Mr. Patrick P. Rogers

P.S. To be precise, if the state files certiorari and it is denied, then I want nothing less than a complete retrial of this cause. If the state does not seek certiorari then my plea offer still stands.